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No. 83-1429

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ALABAMA POWER CO., *et al.*,
Petitioners,

v.

SIERRA CLUB,
NATURAL RESOURCES DEFENSE COUNCIL,
COMMONWEALTH OF PENNSYLVANIA,
STATE OF NEW YORK,
COMMONWEALTH OF MASSACHUSETTS,
STATE OF VERMONT,
STATE OF RHODE ISLAND,
AND STATE OF NEW HAMPSHIRE,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for
the District of Columbia Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

Whether the D.C. Circuit, in reviewing regulations promulgated by the Environmental Protection Agency pursuant to §123 of the Clean Air Act, 42 U.S.C. §7423, properly concluded that the agency erred by

1. Implying an unauthorized exemption to the comprehensive prohibition on dispersion techniques in §123(a) of the Act;

2. Failing to implement the statutory term "nearby terrain obstacles" (§123(c));

3. Defining the statutory term "excessive concentrations" (§123(c)) so as to allow evasion of pollution controls through tall smokestacks that serve no public health or welfare goals;

4. Defining the statutory term "good engineering practice" (§123(a)(1) & (c)) in a biased manner that favors taller smokestacks and increased pollution; and

5. Adopting a twenty-two month timetable for implementation of its regulations, in disregard of the explicit nine-month deadline in §406(d)(2) of the Act, 42 U.S.C. §7401 note.

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OPINION BELOW

The opinion of the court of appeals dated October 11, 1983 (Pet. App. at 1a)¹ is reported at 719 F.2d 436.

¹ The appendix to the petition of Alabama Power, *et al.*, will be cited herein as "Pet. App. at ____". The petition itself will be cited as "Pet. at ____". The response of Kennecott will be cited as "Kenn. Resp. at ____".

JURISDICTION

The jurisdiction of the Court lies pursuant to 28 U.S.C. §1254(1).

STATUTE AND REGULATIONS INVOLVED

The provisions of the Clean Air Act pertinent to this case are §123, 42 U.S.C. §7423 (Pet. App. at 110a), and §406(d)(2), 42 U.S.C. §7401 note (Pet. App. at 66a). The regulations reviewed by the court below (Pet. App. at 80a) were published at 47 Fed. Reg. 5864 (February 8, 1982). The proposed regulations that preceded these final regulations were published at 46 Fed. Reg. 49814 (October 7, 1981), and 44 Fed. Reg. 2608 (January 12, 1979).

STATEMENT OF THE CASE

This case poses the question whether a handful of electric utilities and metal smelters may persist in their longstanding refusal to comply with air pollution control requirements that have been in effect since 1970.

In that year Congress enacted an extensive overhaul of the Clean Air Act ("CAA") that directed the Environmental Protection Agency to establish "national ambient air quality standards". CAA §109(a), 42 U.S.C. §7409(a). These standards were to specify maximum levels of pollution, exceedance of which would threaten the health and welfare of the public. CAA §109(b), 42 U.S.C. §7409(b). Congress intended that industrial facilities would meet these standards by reducing the quantities of pollution they emit into the air. CAA §110(a)(2)(B), 42 U.S.C. §7410(a)(2)(B) (directing states to adopt, and submit to EPA for approval, enforceable "emission limitations").

While most polluters complied with Congress's mandate, a number of electric utilities and smelters refused to implement any significant emissions reductions. Instead, this recalcitrant minority chose to construct tall smokestacks to disperse their emissions over ever wider areas. Pet. App. at 65a-66a; H.R. Rep. No. 294, 95th Cong., 1st Sess. 88 (hereinafter "House Report"), [1977] U.S. Code Cong. & Ad. News at 1166.

Because these "tall stacks" leave total emissions unchanged, any decrease they produce in pollution concentrations near the emitting facility is bought at the price of increased pollution elsewhere. House Report at 84-85, U.S. Code Cong. & Ad. News at 1162-63.

In the years following 1970 EPA adopted a policy of allowing industry to substitute tall stacks for emissions reduction. This policy was struck down as inconsistent with the 1970 Act in *Natural Resources Defense Council v. EPA*, 489 F.2d 390 (5th Cir. 1974), *rev'd on other issues sub nom. Train v. NRDC*, 421 U.S. 60 (1975); *accord, Kennecott Copper Corp. v. Train*, 526 F.2d 1149 (9th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976); *Big Rivers Electric Corp. v. EPA*, 523 F.2d 16 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976). EPA initially took no action to implement these decisions. Finally, threatened with a contempt proceeding, *NRDC v. EPA*, 529 F.2d 755 (5th Cir. 1976), the agency issued a nonregulatory "Stack Height Increase Guideline". 41 Fed. Reg. 7450 (1976).

In the deliberations on the 1977 Amendments to the Clean Air Act, EPA's guideline was criticized strongly in Congress:

The guidelines are considerably less protective of the environment than the courts' decisions require.

Far from prohibiting the construction of tall stacks or the use of intermittent controls, the guidelines provide that once minimal emission control requirements are met, polluters are encouraged to substitute unlimited stack height for any further control of emissions.

123 Cong. Rec. 18027 (1977) (remarks of Senator Muskie).

Faced with these deficiencies, and with alarming evidence that pollution from tall stacks harms the environment and restricts economic growth, House Report at 82-88, U.S. Code Cong. & Ad. News at 1160-67, Congress added §123 to the Act. EPA has described the effect of this new provision as follows:

While Congress was aware of the Agency's Stack Heights Increase Guideline, it rejected much of the Guideline in the 1977 Amendments and adopted new requirements limiting use of dispersion technology to a greater extent than either the Guideline or the court decisions.

44 Fed. Reg. 2608, 2609 (1979).

Section 123 states flatly that tall stacks are not an acceptable strategy for complying with the Clean Air Act. The method Congress chose to implement this prohibition is of paramount importance to the present case. Since the public is harmed by the increased pollution a tall stack allows, rather than by the stack itself, §123 focusses solely on pollution levels. Congress specifically left industry free to construct stacks as tall as it chooses, §123(c), but provided that excessive stack height must be ignored by pollution authorities when they conduct the computer modeling that is used to set emission limitations. As a result, sources with excessively tall stacks will no longer be allowed to emit more pollution than similarly situated sources with legitimately sized stacks.

For purposes of §123, stack height is to be deemed excessive if it is greater than "good engineering practice" ("GEP"), defined as the height necessary to prevent an aerodynamic phenomenon known as "downwash".² Prevention of downwash is not an independent regulatory goal under §123, and indeed the statute gives EPA no authority to require that stacks be built up to GEP height. Instead, GEP is simply the "bright line" Congress drew to distinguish legitimately sized stacks designed to prevent local nuisances from tall stacks designed to evade emission controls.

Congress directed EPA to issue implementing regulations within six months of enactment of §123. Within nine months thereafter, emission limitations of individual polluters were to be reexamined and revised as necessary to eliminate reliance

² Downwash occurs when turbulent air currents sweep a facility's exhaust gases to the ground on or near the plant site. Section 123(c).

on tall stacks and other dispersion techniques. CAA §406(d)(2)(B), 42 U.S.C. §7401 note.³

Four years after expiration of the congressionally prescribed deadline, under compulsion of a court-ordered timetable,⁴ EPA promulgated regulations pursuant to §123. 47 Fed. Reg. 5864 (1982). On virtually all key issues these rules reversed positions taken by the agency in proposed rules issued in January 1979. 44 Fed. Reg. 2608. Respondents Sierra Club, Natural Resources Defense Council and Commonwealth of Pennsylvania sought review of these regulations in the D.C. Circuit pursuant to §307(b)(1) of the Act, 42 U.S.C. §7607(b)(1). Joining their challenge were the States of New Hampshire, New York, Rhode Island, and Vermont, and the Commonwealth of Massachusetts.

On October 11, 1983 the D.C. Circuit issued an opinion that rejected some of petitioners' challenges and accepted others. Specifically, the court affirmed two provisions of EPA's regulations, reversed two provisions as beyond the agency's statutory authority,⁵ and remanded six provisions to the agency for further action.⁶ Pet. App. at 69a. It is this decision that is challenged in the present petition for certiorari,

³ See also S.Rep. No. 127, 93rd Cong., 1st Sess. 95 (1977):

EPA will be expected to review existing State implementation plans and require revision in any that depend upon dispersion techniques rather than continuous controls. Where necessary State implementation plans will have to be modified.

This passage appears in the legislative history of §302(k) of the Act, which reinforces the mandate of §123 by defining "emission limitation" to include only continuous methods of emission control. 42 U.S.C. §7602(k). See 44 Fed. Reg. at 2609; 47 Fed. Reg. 5864, 5864 n.1 (1982).

⁴ *Sierra Club v. Gorsuch*, Civil No. 81-0094 (D.D.C.).

⁵ One of these provisions was not a substantive element of EPA's regulatory program, but rather a timetable for implementation of that program. Pet. App. at 61a-62a.

⁶ With respect to one of these provisions, the court did not issue any substantive ruling, but found that the agency had committed a procedural error by failing to respond to a public comment during the rulemaking. Pet. App. at 61a-62a. With respect to another, the court affirmed the basic principle underlying the agency's approach, but held that it had been too broadly applied. Pet. App. at 62a-63a.

filed by a consortium of electric utilities that intervened in the proceedings below. The Environmental Protection Agency has not petitioned for certiorari.

REASONS FOR DENYING THE PETITION

The decision of the D.C. Circuit will have only limited social and economic impacts, and will not significantly alter administration of air pollution regulatory programs. This Court has twice denied certiorari in cases concerning the legality of tall stacks and dispersion techniques, even though those cases entailed consequences more far-reaching than are at issue here.

The D.C. Circuit properly deferred to EPA's regulatory judgment, and relied specifically on cases of this Court in doing so. The court overturned portions of the agency's rules only reluctantly, after concluding that certain of the agency's statutory interpretations were unreasonable, and certain of its regulatory conclusions were irrational, unsupported by evidence, and contrary to the purposes of §123.

1. The Social and Economic Impacts of the D.C. Circuit's Decision are Limited.

Petitioners have sought to inflate the importance of this case by sprinkling their petition with references to, *inter alia*, "staggering" economic and social consequences of the D.C. Circuit's decision (Pet. at 3), "infinitely more complex" air quality programs (*id.* at 4), and "dramatic redirection" of air pollution regulation (*id.* at 3). In this hyperbole it is difficult to recognize the true D.C. Circuit decision, which is sharply limited in both application and impact.

a. In a provision of its rules not affected by the D.C. Circuit's decision, EPA has exempted from regulation on *de minimis* grounds all stacks up to 65 meters—213 feet—in height. Pet. App. at 11a-12a. This exemption covers 97 percent of the stationary sources of sulfur dioxide in the nation. 46 Fed. Reg. 49814, 49821 col. 1 (1981). The few facilities with

stacks above 65 meters consist almost exclusively of 148 power plants and four copper smelters.⁷

Even among this group, only a fraction will be affected by the decision below. Emissions must be reduced only at those facilities that meet *both* of the following conditions: (1) the facility's stacks exceed GEP height, and (2) when GEP height is substituted for actual height in the mathematical model used to set emission controls, the model predicts unlawfully high pollution levels.⁸

Nor will the D.C. Circuit's decision inhibit industrial growth. All new power plants and smelters must comply with special emission control requirements that cannot be evaded by use of dispersion techniques.⁹ Petitioners have not shown that the decision below will significantly add to these requirements.¹⁰

b. Petitioners have likewise failed to show that the decision below will have nationally significant monetary impacts. The very EEA Report cited by petitioners concluded that the nationwide impact of the 1979 proposal on electricity rates would be "small", ranging up to a maximum worst-case

⁷ EPA, Impact Assessment Report for the Final Stack Heights Regulations (December 1981), at 2; H.E. Cramer Co., Identifying and Assessing the Technical Basis for the Stack Height Regulatory Analysis (December 1979), at 23-24.

⁸ Section 123 also requires regulation of dispersion techniques other than stack height. §123(a)(2). The D.C. Circuit found EPA's regulations on this issue to be deficient (Pet. App. at 50a-57a), but expressly endorsed the use of a *de minimis* exemption to limit the number of facilities subject to review. Pet. App. at 56a. Petitioners do not challenge this portion of the court's decision.

⁹ 40 C.F.R. §§60.40a, 60.160, 60.170, and 60.180 (new source performance standards for new power plants and smelters); CAA §163(a)(4), 42 U.S.C. §7475(a)(4) (all major new facilities in clean air areas must use "best available control technology"); CAA §173(2), 42 U.S.C. §7503(2) (all major new facilities in dirty air areas must comply with "lowest achievable emission rate").

¹⁰ The very EPA consultant's report relied upon by petitioners concluded that EPA's 1979 proposal would not require significant emissions reductions beyond those mandated by EPA's new source performance standards. Energy and Environmental Analysis, Inc., Cost and Economic Impact Analysis of the Proposed Stack Heights Regulation (August 15, 1980) (hereinafter "EEA Report"), at 4.

level of 1.3 percent (Pet. App. at 128a, 123a). EPA concluded that the EEA Report's figures were "too high", and estimated total nationwide rate increases at less than 0.1 percent.¹¹ Contrary to the assertions of petitioners and Kennecott (Pet. at 10-11, 23-24 n.52; Kenn. Resp. at 4), the agency found that terrain effects were as likely to *reduce* these costs as to increase them.¹²

c. The administration of air pollution programs will not be "redirect[ed]" by the D.C. Circuit's decision. Pet. at 3. Specifically, the states would not "be forced to refocus their air pollution control on nonexistent pollution concentrations predicted using mathematical models." Pet. at 28. Mathematical models long ago replaced on-site measurements of pollution as the nearly universal method of setting air pollution regulations.¹³ The effect of §123 thus is not to replace real pollution measurements with theoretical models, but merely to substitute one assumption for another in already-existing models. As noted above, such substitutions will be required only for a limited group of industrial facilities.

Petitioners' claim that "states would have had difficulty coping with the reviews required under the 1979 proposal" (Pet. at 28 n.61) is irrelevant here. EPA responded to the states' concerns by increasing the *de minimis* stack height from thirty to sixty-five meters, thus vastly reducing the number of facilities whose emission limitations would have to be reexamined. 46 Fed. Reg. 49814, 49821 col. 3 (1981). This solution remains unaffected by the D.C. Circuit's opinion. Pet. App. at 11a-12a. It should also be noted that the states who join in the present brief, and who joined in challenging EPA's regulations in the court below, would not have done so if they had doubted their ability to conduct the regulatory

¹¹ EPA, Impact Assessment Report for the Stack Heights Regulations (April 1981) at 6, 18.

¹² April 1981 Impact Assessment Report, *supra* n. 11, at 12. The EEA Report specifically concluded that terrain effects would reduce the costs of the 1979 proposal. EEA Report, *supra* n. 10, at 6.

¹³ See, e.g., Memorandum on Section 107 Designation Policy Summary from Sheldon Meyers, Director, EPA Office of Air Planning and Standards, to Regional Air Management Division Directors (April 21, 1983), at 2, paragraph 3.

reviews associated with stricter rules.¹⁴ No states intervened below on behalf of EPA.

2. This Court Has Declined To Review Dispersion Techniques Cases More Important Than the Present One.

Petitioners' discussion of prior petitions for certiorari under the Clean Air Act (Pet. at 2-3, 4) omits the very cases most relevant here. In *NRDC v. EPA*, 489 F.2d 390 (5th Cir. 1974), *rev'd on other issues sub nom. Train v. NRDC*, 421 U.S. 60 (1975), the Fifth Circuit ruled that tall stacks and dispersion techniques were prohibited by the Clean Air Act of 1970, and rejected EPA's contrary construction of the Act. Industry sought to overturn this decision by filing suit in two other circuits, and petitioning for certiorari from the resulting unfavorable decisions. This Court denied both petitions. *Big Rivers Electric Corp. v. EPA*, 523 F.2d 16 (6th Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *Kennecott Copper Corp. v. EPA*, 526 F.2d 1149 (9th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976).

If Supreme Court review was inappropriate in the very cases that initially established the broad prohibition on dispersion techniques, such review is *a fortiori* inappropriate in the present case, which concerns only the manner in which this prohibition will be implemented.¹⁵

3. The D.C. Circuit Properly Deferred to EPA.

Petitioners characterize this case as a broad test of the degree of deference to be accorded agency action. Pet. at 16-

¹⁴ The letter cited by petitioners (Pet. at 28 n.61) does not represent the official position of the state of New York. The Commissioner of the New York Department of Environmental Conservation recently wrote to EPA and the Solicitor General urging that the Government not file a petition for certiorari in these proceedings, and stating "[w]e believe that all aspects of the United States Court of Appeals' decision constitute correct and proper interpretations of the Clean Air Act." Letters of May 7, 1984 from Henry G. Williams to William Ruckelshaus and Rex Lee, at 1.

¹⁵ Petitioners' allegations concerning the relative importance of the present case and previous cases before this Court (Pet. at 4) ignores the factors which greatly limit the effect of the D.C. Circuit's decision. See pp. 6-9, *supra*. Equally important, EPA has not sought certiorari here as it did in two of the three cited cases.

22. But the opinion below shows that the D.C. Circuit understood the teachings of this Court on this issue (Pet. App. at 48a), and that it applied those teachings to uphold the agency's definitions of two statutory terms, despite persuasive indications in the statute and legislative history that EPA had misinterpreted Congress's mandate. Pet. App. at 48a-49a, 59a.¹⁶ Petitioners cannot prove error in the present case by citing *other* D.C. Circuit opinions, particularly when those opinions were written and joined by judges not on the panel below. Pet. at 16 n.36, 17 n.37, & 17-18 n.41.

Nor are petitioners assisted by their reliance on the cases that counsel granting "legislative effect" to agency interpretations of statutes. Pet. at 18-19. These cases hold that a reviewing court must determine "whether the Secretary has exceeded his statutory authority and whether the regulation is arbitrary and capricious". *Herweg v. Ray*, 455 U.S. 265, 275 (1982); *accord*, *Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981); *Batterton v. Francis*, 432 U.S. 416, 426 (1977). These are precisely the standards applied by the court below. *See, e.g.*, Pet. App. at 5a ("[W]e find certain aspects of the regulatory scheme to be contrary to the terms of the statute and others to be arbitrary and capricious exercises of the discretion conferred on the EPA by the Act."); *id.* at 69a (reversing two provisions of EPA's rules as "beyond the agency's statutory authority"); *id.* at 44a (stating that the court's task is to determine "whether EPA acted arbitrarily and capriciously"); *id.* at 16a (overturning provision that violates "the clear thrust of the statutory language").

Also applicable here is *Batterton's* statement that an agency may not adopt a regulation "that would defeat the purpose of the . . . [statutory] program". 432 U.S. at 428. All of the provisions overturned or remanded by the D.C. Circuit would have resulted in increased use of tall stacks by polluters,

¹⁶ The court also affirmed the agency on two other issues (Pet. App. at 14a, 28a-31a), and endorsed much of the agency's approach towards a third. Pet. App. at 62a-66a.

thus defeating §123's central purpose of requiring industry to clean up its pollution rather than disperse it.¹⁷

In sum, this case cannot be resolved by a broad decision concerning the appropriate standard of deference to EPA. Rather, this Court will necessarily be called upon to review the statute, legislative and regulatory history, and administrative record to determine if the D.C. Circuit reached a permissible result as to each of the specific issues raised by petitioners.¹⁸ Such review would produce narrow decisions on issues such as: whether GEP should be computed via a rule-of-thumb formula or a case-specific modeling demonstration (Pet. App. at 39a-47a); whether terrain obstacles need to be "nearby" a pollution source to justify increased stack height credit (Pet. App. at 13a-18a); and whether a percentage increase test is a rational method of defining GEP (Pet. App. at 18a-28a). Such issues are more appropriately left to the lower courts.

¹⁷ Contrary to petitioners' assertion (Pet. at 4, 29), Congress specifically found that the public would benefit from the pollution reductions required by §123. House Report at 82-88, U.S. Code Cong. & Ad. News at 1160-67.

¹⁸ As this Court observed in one of the cases cited by petitioners:

Although the Court of Appeals first addressed whether and to what extent it should defer to the Commission's construction of the Act, ... this discussion and the conclusion that little or no deference was due the Commission were *pointless* if the court was correct that the agency agreements violated the plain language of the Act as well as the statutory purposes revealed by the legislative history. The interpretation put on the statute by the agency charged with administering it is entitled to deference, . . . but the courts are the final authorities on issues of statutory construction. They must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement. . . . Accordingly, the crucial issue at the outset is whether the Court of Appeals correctly construed the Act.

FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 31-32 (1981) (emphasis added), cited in Pet. at 19 n.43.

4. The D.C. Circuit Correctly Determined That Portions of EPA's Regulations Are Inconsistent With The Clean Air Act and Unsupported by the Administrative Record.

While petitioners attempt to portray the D.C. Circuit as a runaway court inclined to overturn agency action for insubstantial reasons, examination of the opinion below makes clear that the court approached this case objectively and vacated portions of EPA's regulations only reluctantly, after concluding they exceeded the agency's authority under the Clean Air Act or were unsupported by the administrative record.

a. *Plume Impaction*—The issue about which petitioners and Kennecott complain most loudly is the D.C. Circuit's invalidation of EPA's exemption for plume impaction. Pet. at 22-26; Kenn. Resp. at 4. A glance at the statute and EPA's rulemaking preamble reveals the correctness of this invalidation, and the falsity of petitioners' assertion that EPA's plume impaction exemption was written against a background of "Congressional silence". Pet. at 26. Section 123 flatly prohibits emission credit for stacks taller than GEP, §123(a)(1), defined as the stack height necessary to prevent "downwash, eddies and wakes". Section 123(c). EPA's plume impaction exemption allows emission credit for stacks taller than necessary to prevent "downwash, eddies and wakes",¹⁹ 47 Fed. Reg. at 5866 col. 3, thus violating the plain language of §123.

Petitioners assert that, because §123 does not specifically mention plume impaction, EPA was free to carve out an exemption from the comprehensive prohibition in §123(a)(1). Pet. at 25-26. This argument is directly contrary to settled principles of statutory construction set forth in the decisions of this Court. Pet. App. at 33a-34a, 35a. Moreover, other

¹⁹ Petitioners do not argue otherwise.

Petitioners' description of the operation of EPA's plume impaction exemption is misleading and inaccurate. In particular, it is petitioners, not the D.C. Circuit, who would have EPA apply "a second false assumption" (Pet. at 23) in the implementation of §123. In petitioners' view EPA must assume not only that stack height is equal to GEP height, but also that "terrain height [is] . . . equal to GEP stack height." Pet. at 23 n.51.

provisions of the Act demonstrate that Congress knew how to provide for more lenient treatment of polluters in rugged terrain when it wished to do so. Pet. at 26 n.56, citing CAA §§165(d)(2)(D)(iii)-(iv). The absence of a plume impaction exemption in §123 must therefore be interpreted as a deliberate congressional choice to deny such treatment here.

b. *Nearby*—Petitioners' arguments concerning the statutory term "nearby" are premised on the false assertion that the D.C. Circuit "set aside EPA's definition of 'nearby terrain obstacles'". Pet. at 15. In reality the court set aside EPA's total *failure* to define that concept. While Section 123(c) defines GEP as the stack height necessary to prevent downwash created by "*nearby* structures or *nearby* terrain obstacles" (emphasis added), EPA's regulations refer only to downwash created by "structures, or terrain obstacles". 47 Fed. Reg. at 5868-69 (to be codified in 40 C.F.R. §51.1(ii)(3)). Moreover, the definition of "nearby" in EPA's regulations applies only to "structure[s]", not terrain obstacles. *Id.* at 5869 (to be codified in 40 C.F.R. §51.1(j)).

EPA's failure to implement the term "nearby terrain obstacles" violates the plain language of §123(c), as well as its legislative history. House Report at 93, U.S. Code Cong. & Ad. News at 1171, cited in Pet. App. at 13a-14a.

c. *Excessive Concentrations and GEP Formula*—With respect to both of these concepts, the D.C. Circuit properly remanded regulatory provisions that were patently irrational, unsupported by the administrative record, and contrary to the goals of §123.

1. The definition of "excessive concentrations" adopted by EPA

would permit a source located in a very clean area to raise its stack height credit, even if the downwash avoided would only increase pollutant concentrations by a very small amount that would be of no harm to anyone.

Pet. App. at 18a-19a. Noting that the increased stack height credit allowed by EPA's definition "will mean increased

emissions and longer transport of pollutants, both of which Congress has instructed the agency to minimize" (Pet. App. at 28a), the court remanded to EPA "with instructions to develop a standard directly responsive to the concern for health and welfare that motivated Congress to establish the downwash exception". *Id.* The court did not attempt to dictate the form such a standard would take.

2. EPA's regulations included a mathematical "GEP formula" designed to serve as an approximation of the stack height necessary to prevent downwash, eddies and wakes, 47 Fed. Reg. at 5868 col. 3 (to be codified in 40 C.F.R §51.1(ii)(2)), but improperly adopted a skewed policy concerning the correction of errors in this approximation. Under EPA's regulations the formula may be corrected only when it underestimates GEP, but never when it overestimates. The effect of this approach is to allow corrections that result in increased stack height credit and more pollution, 47 Fed. Reg. at 5865 col. 2, but to prohibit corrections that result in decreased stack height credit and less pollution. 46 Fed. Reg. at 49820 col. 3. Finding that "there is virtually no evidence in the record supporting a conclusion that the formulas err only in one direction" (Pet. App. at 45a), the D.C. Circuit concluded:

Rationality demands that if the inaccuracy is neutral,
the corrective device must be neutral.

Id. at 46a. Accordingly, the court remanded EPA's biased rule.

d. *Requirements on Remand*—In the preamble to its regulations EPA stated it would allow the states twenty-two months to implement the requirements of those regulations. Pet. App. at 66a-67a. The court correctly set aside this schedule as violative of §406(d)(2) of the Act, which requires states to complete their implementation within nine months. *Id.* at 66a-68a.

CONCLUSION

Review by this Court would result in a set of narrow decisions concerning a regulatory program of limited applic-

ability. Such decisions would uphold the D.C. Circuit, which correctly applied the standards for judicial review of agency action. For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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